

## **AGREEMENT**

**WHEREAS**, the City of Cincinnati (“City” or “Grantor”) desires to assure the widespread availability of Telecommunications Services within the City to promote commerce and otherwise further the public interest;

**WHEREAS**, the City desires to protect Rights-of-Way and ensure adequate compensation for usage of said Rights-of-Way;

**WHEREAS**, the City has adopted the following telecommunications policy objectives for use of the City’s Rights-of-Way:

- I.** Policy Objective – Stimulate economic growth through development of an advanced telecommunications infrastructure with numerous alternative providers. Promote and protect competition in communications.
- II.** Policy Objective – Protect the City’s public property.
- III.** Policy Objective – Ensure adequate compensation to the City from competitive enterprises for usage of the Rights-of-Way.
- IV.** Policy Objective – Encourage private sector creation of the information highway and continued upgrading of telecommunications infrastructure.
- V.** Policy Objective – Preserve universal telecommunications service at reasonable rates.
- VI.** Policy Objective – Meet social goals to provide access to information. Provide open, nondiscriminatory access to information.
- VII.** Policy Objective – Protect citizens’ rights to privacy.
- VIII.** Policy Objective – Mitigate any negative environmental impact resulting from usage of the rights-of-way.

**NOW, THEREFORE**, the City and \*\*????\*\* (“Grantee”) agree as follows:

### **Section 1. DEFINITIONS**

For the purposes of this Agreement, the following terms, phrases, and their derivations shall have the meanings given below unless the context indicates otherwise. When not inconsistent with the context, words used in the present tense include the future tense, words in the plural include the singular, and words in the singular include the plural.

- A.** Grantee is \*\*????\*\*. The Grantee has represented that it is authorized to execute this contract as evidenced by Exhibit A.

- B. **“Telecommunications Service Provider”** for the purpose of this agreement shall mean any person or entity using City rights-of-way to provide telecommunications services as defined herein, including local exchange provider(s) to the extent so engaged.
- C. **“Rights-of-Way”** means the surface of, and the space above and below, any public street, sidewalk, road, alley, or highway, including under or along bridges, or any other public way or rights-of-way of any type whatsoever within the City.
- D. **“Telecommunications Services”** shall mean the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used (47 U.S.C. 153 [46]). The term “telecommunications” shall mean the transmission, between or among points specified by the user, of information of the user’s choosing, without change in the format or content of the information sent or received. (47 U.S.C. 153 [43]). Grantee shall not provide a cable system or provide video programming, as defined by Section 602 of the Cable Communications Policy Act of 1984, as amended (47 U.S.C. 522).
- E. **“Telecommunications System”** means all cables and the necessary facilities and other property owned, used or leased by the Grantee for purposes of providing Telecommunications Services in the City.
- F. **“Conduit Facility”** means any structure, or section thereof, containing one or more inner ducts, conduits, manholes, handholds, or other such facilities used by Grantee pursuant to this Agreement.
- G. **“Innerduct”** means a single, enclosed raceway for conductors, optical fiber, wire or other cable.
- H. **“Gross Revenues”** shall mean all revenues actually received by Grantee, including but not limited to, installation fees, service charges, switched voice services and dedicated access facilities for Telecommunications Services originating and/or terminating within the City of Cincinnati and billed to Grantee’s end users located in the City of Cincinnati. In no event shall the percentage of Gross Revenue paid by Grantee exceed that paid by any other Telecommunications Service Provider within the City of Cincinnati providing similar services to that of Grantee, with the exception of Cincinnati Bell (such exemption to cease on August 10, 2000 in accordance with Section 3(E) of this Agreement). Gross Revenues also include the fair market value of any non-monetary transactions for Telecommunications Services between the Grantee and any third party. Gross Revenue does not include any sales and excise taxes collected by the Grantee on behalf of the state, City, or other governmental unit, nor does it include revenues billed on behalf of a third party as a third party billing agent. The calculation of Gross Revenues shall be reduced by the amount of Grantee’s payments to other providers for Telecommunications systems and/or for services that Grantee uses to provide Grantee’s Telecommunications Services. When Telecommunications Services are provided that cross municipal boundaries, the

Gross Revenues will be calculated using the per cent of City Rights-of-Way utilized, compared to the total right-of-way utilized to complete the total circuit mileage.

- I. **“Third Party Reseller”** means any customer of Grantee whose dominant business is the rebilling or repackaging of the Grantee’s Telecommunication Services into that customer’s primary product or service offering.

“Third Part Reseller” does not include:

1. interexchange carriers purchasing or leasing the telecommunications system or services for purposes of providing interexchange long-distance service, or
2. service providers who provide turnkey networking services and who contract with the Grantee as the transport provider for their networking services.

## **Section 2. SCOPE**

- A. The City of Cincinnati does hereby grant to Grantee the right to install, operate, and maintain a Telecommunications System in the City’s Rights-of-Way, as shown on the attached Exhibit B, under the following terms and conditions:

1. The City of Cincinnati does hereby grant to Grantee the right to install, operate, and maintain a Telecommunications system in City’s Rights-of-Way, as shown on the attached Exhibit B, under the following terms and conditions:
2. All installations shall be done in accordance with the Agreement, including, but not limited to, Section 6 (“Construction and Relocation”) and Section 7 (“Restoration of Streets”), and no such installation shall be done in a manner detrimental to the interest of adjacent property owners or the public.
3. Grantee may enter into agreements with providers of existing conduit in the Rights-of-Way for the use of such conduit, provided that written notice is given to the City identifying such agreement, subject to sub-grantee’s rights to use the City’s Rights-of-Way. This subsection shall not be interpreted to mean that Grantee may not enter into agreements with other providers for the joint usage of conduit.
4. Grantee may install in the Rights-of-Way new Telecommunications Systems and Conduit Facilities only with the prior approval of City’s Department of Transportation & Engineering, and such approval shall not be unreasonably withheld or delayed. It is understood that the City is concerned about limited Rights-of-Way space availability, traffic delays, interruption to businesses, and faulty street reconstruction which may result from the installation of new Conduit Facilities. Notwithstanding any other provision of this contract, nothing in this agreement is to be construed as giving Grantee the right to extend its Telecommunications System without prior City approval of the City’s Department of Transportation & Engineering.

- B. Whenever Grantee desires to expand the Telecommunications System identified on Exhibit A, it shall inform the City of its plans prior to implementing the project. Any expansion requiring street excavation shall not be permitted, without prior approval of the City's Department of Transportation & Engineering, such approval not to be unreasonably withheld or delayed.
- C. Grantee is given the right to operate its Telecommunications System as defined in Sections 1(E) and 2(A) for a period of three (3) years commencing with the execution of this Agreement by the City. Grantee has the right to extend this Agreement for two consecutive periods, each of which periods Grantee may select a duration of one to five years. Grantee shall provide the City with written notice of its intent to exercise the options granted herein at least sixty days prior to the expiration of the applicable term.

If, during the term, the City notifies Grantee that a City utility facility is available which provides Grantee's Telecommunications System with the functionally equivalent degree of protection that it has in Grantee's Conduit Facility, then Grantee may vacate the conduit occupied under this Agreement, within five years of the date of availability, at Grantee's expense, and relocate into the City's facility and at a fee structure to be reasonably set forth by the City. The City will provide Grantee with adequate space in the utility facility, including adequate redundancy paths. The right to occupy said facility must be exercised by Grantee within a reasonable time of the notification. Such relocation shall be subject to the terms of this Agreement. Upon relocation of all or part of Grantee's Telecommunications System into a City utility facility, title to so much of Grantee's Conduit Facility remaining in the City streets that is no longer occupied by Grantee as a result of said relocation shall pass to the City.

- D. Grantee and the City shall comply with all applicable Federal, State and local laws or regulations.

### **Section 3. COMPENSATION AND AUDITING**

- A. Grantee shall pay to the Treasurer of the City of Cincinnati c/o Director of General Services, throughout the term of the Agreement, as compensation for the occupation and disturbance of the Rights-of-Way, five per cent (5%) of Grantee's Gross Revenues, on a quarterly basis no later than forty-five (45) days after the end of each quarter. In the event five per cent (5%) of Grantee's Gross Revenues is less than Five Thousand Dollars (\$5,000) in any one-year period that begins on the first of September and runs through the succeeding August (excluding any period prior to September 1, 1998), Grantee shall pay to the City the amount necessary to bring Grantees's payments to a total of Five Thousand Dollars (\$5,000) for that year no later than forty-five (45) days after the end of such year. The five per cent (5%) referenced herein shall be phased in at the rate of one per cent (1%) per year: year one at three per cent (3%) beginning on the date of this Agreement's execution and running through August 1999; year two at four per cent (4%) beginning on September

1, 1999 and running until \*\*\*\*date\*\*\*\* ; after which the five per cent (5%) will be applicable.

- B. Accompanying each payment to the City, pursuant to Section 3(A), the Grantee shall file with the City a report of its calculation of the payment, setting forth the Gross Revenues and how the Gross Revenues were calculated.
- C. All Grantee's audited financial statements, books, maps, and records concerning its Gross Revenues and its calculation of payments to the City, pursuant to Section 3(A), shall be open for inspection by the appropriate officer of the City, or its designee, at all convenient times, upon not less than forty-eight (48) hours prior written notice to Grantee, to determine the amount of compensation due to the City from Grantee under this Agreement. All other reports required by the Charter and ordinances of the City shall be made by Grantee from time to time as required.
- D. In the event Grantee makes one or more under-payments pursuant to Section 3(A), and said under-payments exceed five per cent (5%) of the amount payable to the City hereunder, or in the event Grantee fails to make any payment within ten (10) days after the due date, Grantee shall pay interest at a rate of one and one-half per cent (1 ½%) per month, or the highest rate allowed by law, whichever is lower, on said underpayment(s) and/or said late payments.
- E. Services, equipment or conduit requested by the City through the Division of Telecommunications and provided to the City by Grantee without charge or at a discount of the amount the City would otherwise be charged under Grantee's tariffs or price schedules for the services or equipment shall be credited against the contract fee otherwise due the City as follows: The charges avoided by the City in a given quarter by virtue of the no charge and discounted services provided to the City by Grantee shall be deducted from the percentage of gross revenues otherwise due in that quarter. Grantee shall provide a detailed description and supporting documentation for its calculation of the avoided charges credit. To the extent the credit exceeds the applicable percentage of gross revenues fee for any given quarter, the difference may be carried over to the next quarter and applied as a credit against fees due that quarter, with excess credits applied to a rolling four quarters from the first quarter of credit applied.

The City will make a best effort attempt to secure comparable compensation from all Telecommunications Service Providers using the Rights-of-Way.

If, by August 10, 2000, the City is unable to secure comparable compensation for Telecommunications Services provided by Telecommunications Service Providers, including Cincinnati Bell, Bell South or GTE, the City shall then adjust the compensation to be paid by the Grantee to the City under this Agreement to the most favored comparable compensation for a Telecommunications Service Provider, as defined herein, rendered to the City by such Telecommunications Service Provider. Under this circumstance, said adjustment to achieve comparable compensation shall include a reduction to Grantee's compensation payments required for use of the Rights-of-Way after August 10, 2000, and a reduction in Grantee's compensation

payments tendered in excess of comparable compensation for periods prior to August 10, 2000. The adjustment to achieve comparable compensation, for periods prior to and after August 10, 2000, shall put Grantee in the same relative compensation position as the most favored Telecommunications Service Provider(s) during said periods, by adjusting downward the effective percentage of Gross Revenues reflected in Grantee's compensation to the City to equal the effective percentage of Gross Revenues reflected in the most favored Telecommunications Service Provider's compensation to the City for the time periods in question.

"Comparable Compensation" for the purpose of this Agreement shall mean compensation of the same type or category (i.e., cash and/or the fair market value of services and/or the fair market value of services and/or facilities rendered to the City in lieu of cash payments) as that provided by other Telecommunications Service Providers to the City as specified in any agreements to use the Rights-of-Way such other Telecommunications Service Providers have with the City. The amount of such compensation payable to the City by all such Telecommunications Service Providers, including the Grantee, shall be determined on a fair and equitable basis taking into account the relative total revenues of each Telecommunications Service Provider from Telecommunications Services provided to customers using the Rights-of-Way of the City.

- F. Grantee shall provide services to the City on a most favored customer basis (terms no more costly to the City than the most favorable rates or charges offered by Grantee to other customers located within the City of Cincinnati). This applies to monthly recurring charges, installation, and any other costs normally incurred in subscribing to such service. Service shall not be unreasonably denied.

#### **Section 4. INSURANCE**

- A. The Grantee shall maintain public liability and property damage insurance that protects the Grantee and the City, including the City as an additional named insured, as well as the City's officers, agents and employees, from the claims referred to in Section 5. The insurance shall provide coverage at all times, of not less than \$1,000,000 for personal injury to each person, and \$1,000,000 for each occurrence involving property damages, plus costs of defense; or a combined single limit policy of not less than \$5,000,000 covering all claims, plus costs of defense. The policy shall provide that the insurance shall not be canceled or materially altered without thirty (30) days written notice first being given to the City. If the insurance is canceled or materially altered within the terms of this Agreement, Grantee shall provide a new policy with the same terms. Grantee agrees to maintain continuous uninterrupted coverage, in the amounts required, for the duration of the term of this Agreement.
- B. The Grantee shall maintain on file with the City Treasurer a certificate of insurance certifying the coverage required above. The adequacy of the certificate of insurance shall be subject to the approval of the Risk Manager and such approval shall not be unreasonably withheld.

## **Section 5. COVENANT TO INDEMNIFY AND HOLD THE CITY HARMLESS**

Grantee hereby agrees and covenants to indemnify, defend and hold the City, its officers, agents and employees, harmless from any and all claims or causes of action for injury, damage, loss, liability, cost or expenses, arising from any casualty or accident to person or property by reason of any construction, excavation or any act or omission done under this Agreement, by or for Grantee, its agents or employees, or by reason of neglect or omission of Grantee to keep its Telecommunications System in a safe condition. The City will promptly notify Grantee of any claim or legal proceeding which gives rise to the City's right of indemnification under this agreement. Grantee agrees at its own cost and expense to defend the City from and against any action, suit, or proceeding that may be brought against the City that gives rise to a right of indemnification under this agreement. The City shall not pay or settle any such action, suit or proceeding without the prior written consent of Grantee, which consent shall not be unreasonably withheld.

## **Section 6. CONSTRUCTION, MAINTENANCE, AND RELOCATION**

- A. Subject to applicable regulations of the City, and written notice to the City's Department of Transportation & Engineering, Grantee may perform all necessary activity to construct, operate and maintain its Telecommunications System. All construction and maintenance of any and all Telecommunications System facilities within streets incident to Grantee's provision of service shall, regardless of who performs installation and/or construction, be and remain the responsibility of Grantee.
1. Grantee shall apply for and obtain all permits necessary for maintenance, installation and/or construction of any such facilities, and for excavation and laying of any Telecommunications System facilities within City streets. Grantee shall pay all applicable City permit fees pursuant to the City's permit fee schedule. On an annual basis, Grantee shall provide the City with the total amount of streets, measured linearly, occupied by Grantee's system, together with a map, including a electronic file as determined by the City showing the location, available cable space, and size of its installed Telecommunications System in the streets, as built.
  2. On an annual basis, Grantee shall provide the City with the total amount of streets, measured linearly, occupied by Grantee's system, together with a map, including a electronic file as determined by the City showing the location, available cable space, and size of its installed Telecommunications System in the streets, as built.
  3. Subject to Section 2(A)(4) of this Agreement and the applicable ordinances and regulations of the City, Grantee may make excavations in City streets for any facility needed for the maintenance or extension of the Grantee's Telecommunications System. Prior to doing such work, Grantee must apply for, and obtain, appropriate permits from the City, and give appropriate

notices to any further franchisees, licensees or permittees of the City, or bureaus of the City or the City's Infrastructure Coordinating Committee, or other units of government ongoing or maintaining facilities which may be affected by the proposed excavation.

4. In the event that emergency repairs are necessary, Grantee shall immediately notify the City of the need for such repairs. Grantee may initiate such emergency repairs, and shall apply for appropriate permits on the next business day after discovery of the emergency.
- B. Grantee's system shall be constructed and maintained in such manner as not to interfere with sewers, water pipes or any other property of the City or the Metropolitan Sewer District, or with any other pipes, wires, conduits or other facilities that may have been laid in the streets by or under the City's authority.
- C. Upon Grantee's acquisition of any Telecommunications system facilities in the streets, or upon any addition to the City of any area in which Grantee retains any such facilities in the streets, the Grantee shall submit to the City, within thirty (30) days of such acquisition or addition, a statement describing all facilities involved, whether authorized by franchise or prior right, and specifying the location of all such facilities. Such acquisition or addition shall be subject to any rights the City may have, based upon any prior franchise or agreement covering the acquired or added facilities. Such facilities shall immediately be subject to the terms of this Agreement.
- D. The City hereby represents and warrants that in the event Grantee has applied to the City for permits in order to perform any work in the streets of the City, the City shall not delay issuance, withhold issuance, or refuse to issue any such permit that would not otherwise be issued, because Grantee and the City are attempting to comply with and/or negotiate compliance with any provisions of this Agreement.
- E. The grantee shall participate in the City's Infrastructure Coordinating Committee administered by the Department of Transportation & Engineering. The committee meets four times each year. Each street user is required to provide to the City at each meeting an up-dated three year forecast report on the Grantee's planned construction and improvements.

## **Section 7. RESTORATION OF STREETS**

- A. If Grantee excavates or otherwise disturbs the surface of any street, Grantee shall be responsible for proper restoration of the street and its surface within the area affected by the work and shall promptly restore the street to a condition as required by City permit. The City may, after providing notice and reasonable opportunity for the Grantee to act first, refill and/or repave any opening made by Grantee in the street and the documented expense thereof shall be paid by the Grantee. The City reserves the right, after providing notice and a reasonable opportunity for Grantee to act first,



remove and/or repair any work done by Grantee which, in the reasonable determination of the City Engineer, is inadequate. The documented cost thereof, including the reasonable cost of inspection and supervision shall be paid by the Grantee. All excavating made by Grantee in the streets shall be properly safeguarded for the prevention of accidents. All of Grantee's work under this section shall be done in strict compliance with all rules, regulations and ordinances of the City.

- B. To perform work in the City's streets, the Grantee is required to post a bond with the City to ensure restoration of the City's streets as required in Section 7(A); in such event the bond will be comparable to those posted by utility companies engaged in similar work in the streets. The bond shall be in effect for the full term of this agreement or until such time that the use of the Telecommunications system has been discontinued.

## **Section 8. RESERVATION OF CITY STREET RIGHTS**

- A. Nothing in this Agreement shall be construed to prevent the City from constructing public facilities, grading, paving, repairing and/or altering any Street or laying down, repairing or removing public facilities or constructing or establishing any other public work or improvement. All such work shall be done, insofar as practicable, so as to not obstruct, injure or prevent the free use and operation of the Grantee's Telecommunications System. However, if any of the Grantee's Telecommunications System or Conduit Facilities interferes with the construction or repair of any street or public improvement, including construction, repair or removal of a public facility, the Grantee's Telecommunications System or Conduit Facility shall be removed, relocated, or replaced in the manner the City shall direct upon not less than sixty (60) days prior written notice to Grantee. Any and all such removal, relocation, or replacement shall be at the expense of the Grantee.
- B. Nothing in this Agreement shall be construed to prevent the City from authorizing the use of the streets by other entities. All such work associated with the use of the streets by other entities shall be done, insofar as practicable, so as not to obstruct, injure or prevent the free use and operation of the Grantee's Telecommunications System. In the event the City reasonably determines that the use of the streets by entities other than the City requires Grantee to remove, relocate or replace part of Grantee's Telecommunications System or Conduit Facility, Grantee shall promptly provide information as to the location of its Telecommunications System or Conduit Facility in the affected area to such entity to facilitate the relocation. Grantee's Telecommunications System or Conduit Facility shall be removed, relocated, or replaced in the manner the City shall direct upon not less than sixty (60) days prior written notice to Grantee. Any and all costs associated with such removal, relocation, or replacement shall be at the expense of the entity causing the relocation.
- C. Nothing in this Agreement shall be construed to prevent the City from creating underground utility districts. If an underground utility district is created by the City any overhead wires, related equipment, and Telecommunications System owned or operated by the Grantee shall be relocated underground. The City will determine the

location of the right-of-way space for the Grantee's relocated facilities. The Grantee shall be responsible for all costs associated with the relocation the Grantee's facilities.

## **Section 9. DISCONTINUED USE OF FACILITIES**

- A. Whenever Grantee discontinues used of its Telecommunications System within all or part of a particular portion of the streets and does not intend to use said facilities again within five (5) years, Grantee shall submit to the City Engineer, for his approval, a completed notice describing the portion of the Telecommunications System to be discontinued and the anticipated date of discontinuance. Grantee may remove or secure the facility or request that the City permit it to remain in place.
- B. Upon providing the City with said notice of abandonment of all or part of Grantee's Telecommunications System in the City streets, ownership of such abandoned part of the system shall, at that time, at the City's option, pass to the City without the need to pay compensation to Grantee. If the system is abandoned, neither the City nor the Grantee is required to continue operating the system.
- C. Until such time as Grantee abandons its Telecommunications System, relocates into a City utility facility, or no longer has the right to occupy the City's streets, Grantee shall be responsible for all necessary repairs, relocations of the facility, and maintenance of the street area in the same manner and degree as if the facility were in active use, and Grantee shall retain all liability for such non-abandoned facility.
- D. Grantee may, in accordance with a schedule approved by the City Engineer, and at the Grantee's expense, remove all or any portion of its Telecommunications System from the streets, provided that Grantee does so in accordance with all applicable City ordinances, and that it returns the streets to their condition prior to opening.
- E. Any conduits owned by Grantee that remain empty or do not contain active equipment in them for more than five (5) years will be considered abandoned and become the property of the City, at the City's option, unless Grantee, after written notice by the City, establishes to the City's satisfaction that the conduit is not abandoned.

## **Section 10. COMPLIANCE WITH LAWS**

In their activities pursued under this Agreement, Grantee and City shall comply with all rules, regulations, ordinances, statues and laws of the City of Cincinnati, Hamilton County, the State of Ohio and the federal government.

## **Section 11. TERMINATION AND REMEDIES**

- A. Termination

In addition to any other rights set out elsewhere in the Agreement and subject to Paragraph 12(B) below, the City reserves the right to terminate this Agreement, and all of Grantee's rights arising hereunder, in the event that:

1. The Grantee violates any material provision of the Agreement or becomes insolvent;
2. The Grantee is found by a court of competent jurisdiction or and arbitration panel as provided for herein to have practiced any fraud or deceit upon the City.

**B. Notice and Opportunity to Cure**

The City shall give Grantee thirty (30) days prior to written notice of its intent exercise its rights under this Section, stating the reasons for such action. If Grantee cures the stated reason within the thirty (30) day notice period, or if the Grantee initiates efforts satisfactory to the City to remedy the stated violation and the efforts continue in good faith, the City shall not exercise its remedy rights. If Grantee fails to cure the stated violation within the thirty (30) day notice period, or if the Grantee does not undertake efforts satisfactory to the City to remedy the stated violation, then the City, upon reasonable notice, may impose any or all of the remedies available under this Section.

- C.** This Agreement may be terminated by Grantee, at its election and without cause, by delivering written notice thereof to the City at least one hundred eighty (180) days prior to the effective date of such termination.

**Section 12. ARBITRATION**

- A.** The arbitration procedures provided under this Agreement may, if agreed to by both parties, be exercised by the City and Grantee. Alternatively, the parties may agree to pursue reconciliation of any dispute. Each party reserves the right to litigate any matter pertaining to this Agreement or Grantee's Telecommunications System.
- B.** The City may initiate arbitration by sending written notice to Grantee and the Grantee may initiate arbitration by sending written notice to the City. The non-initiating party may then consent to arbitration or refuse arbitration within 15 days from the date notice is received.
- C. 1.** If arbitration is consented to by both parties, the City and Grantee shall each select one arbitrator within fifteen (15) days of receiving notice that arbitration has been consented to.
- 2.** The two arbitrators shall select a third arbitrator within fifteen (15) days after the appointment of the two arbitrators. If the two arbitrators are unable to agree upon a third arbitrator within the time limit, then the third arbitrator

shall be appointed by the presiding judge of the Hamilton County Court of Common Pleas.

- D. After all three arbitrators have been selected, they shall each take an oath to serve neutrally and impartially. The arbitration panel shall then schedule a date, time and place for hearing the presentations of the City and the Grantee. The arbitrators shall make a written report, including findings of fact and conclusions of law, to the City and the Grantee on their final determination within sixty (60) days after completion of the hearing.
- E. The City and the Grantee shall each pay the cost of the arbitrator it selected. The cost of the third arbitrator, along with any other costs associated with or arising from the arbitration, shall be divided equally between the City and the Grantee. However, in any arbitration, each party is responsible for its own attorney fees.
- F. In the event that one or both of the parties hereto does not consent to arbitration, nothing in this section shall be construed as a waiver of the parties' civil remedies.

### **Section 13. FORUM FOR LITIGATION**

Any litigation between the City and the Grantee arising under or regarding this Agreement shall occur, if in the state courts, in the Hamilton County Court having jurisdiction thereof, or if in the federal courts, in the United States District Court for the Southern District of Ohio.

### **Section 14. NOTICE**

Any notice provided for under this Agreement shall be sufficient if in writing and delivered personally to the following addressee or if sent by a nationally recognized overnight delivery service, or if faxed and followed within two business days by certified mail, return receipt requested, or if deposited in the United States Mail, postage prepaid, certified mail, return receipt requested, addressed as follows, or to such other address as the receiving party hereafter shall specify in writing:

If to the City:                      Director of General Services  
   City of Cincinnati  
   Centennial Plaza II  
   805 Central Avenue  
   Cincinnati, Ohio 45202

With a copy to:                      City Solicitor  
   City of Cincinnati  
   Room 214, City Hall  
   801 Plum Street  
   Cincinnati, Ohio 45202

City Engineer  
City of Cincinnati  
Room 405, City Hall  
801 Plum Street  
Cincinnati, Ohio 45202

If to the Grantee: Grantee

With a copy to: Grantee

#### **Section 15. FORCE MAJEURE**

Grantee shall not be responsible for delay or failure in the performance of the promises on its part to be performed hereunder in the delay or failure is due to acts of God, or public enemy or similar causes beyond the control of the Grantee.

#### **Section 16. NOTICE OF P.U.C.O. FILINGS**

Grantee agrees to provide the City all filings made at the Public Utilities Commission of Ohio (P.U.C.O.) relating to Grantee's Telecommunications System in Cincinnati, although failure to do so will not constitute a material breach of this Agreement.

#### **Section 17. UTILITY PROTECTION**

- A. Grantee must participate in the Cincinnati Area Geographic System (CAGIS).
- B. Grantee must participate in the Ohio Utility Protection Service (OUPS) as determined by the Director of Transportation & Engineering. Grantee shall submit within 30 days of the annual renewal, a copy of the paid up, full participatory membership in the Ohio Utilities Protection Service (OUPS). Grantee shall also provide the City with the Permittee's response program and procedures for locating and marking the underground facility(s) that has been permitted. The marking and locating procedures shall be in accordance with ORC Section 3785.25-32 and the requirements of OUPS membership. This requirement shall apply to all facilities owned or operated by Grantee within the streets of the City of Cincinnati, and must be in place prior to issuance of a permit to commence work. The marking and locating procedures shall include the depth of the facility being marked or located.

#### **Section 18. WHOLE CONTRACT**

If any one or more of the covenants or agreements or portions thereof provided in the Agreement become invalid or unenforceable under applicable state or federal law or is held by a court of competent jurisdiction in a final judicial action to be void, voidable or

unenforceable, then such covenant or covenants, such agreement or agreements, or such portions thereof shall be null and void and shall be deemed separate from the remaining covenants or agreements or portions thereof and shall in no way affect the validity or enforceability of the remaining portions of this Agreement.

#### **Section 19. AGREEMENT NOT EXCLUSIVE**

This Agreement is not exclusive.

SIGNED:

The City of Cincinnati

\*\*\*???\* (“Grantee”)

By: \_\_\_\_\_

John F. Shirey  
City Manager

By: \_\_\_\_\_

\*\*\*?Signing Authority?\*\*\*

Date: \_\_\_\_\_

Date: \_\_\_\_\_

Recommended by:

\_\_\_\_\_  
Kevin Shepard  
Director of General Services

\_\_\_\_\_  
John Deatrich  
Director of Transportation & Engineering

Approved as to form:

\_\_\_\_\_  
City Solicitor